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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 195

COMMERCIAL CASUALTY INSURANCE COMPANY,
a Foreign Corporation,
Petitioner and Appellant Below,
vs.
MARJORIE W. STINSON,
Respondent and Appellee Below

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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STATEMENT

(Unless otherwise clearly shown by context, figures in parentheses refer to pages of the printed record)

Appellant's statement of the subject matter involved is not a fair statement of the facts, and is definitely misleading. But, as we interpret the rules and practices in this

proceeding, this Court is not presently interested in the facts. Certiorari is not granted to review evidence and discuss specific facts. *United States v. Johnston,* 268 U. S. 220. Hence we shall address ourselves directly to the legal questions involved. In passing, however, we wish to point out that this case was originally filed in the State Court, and removed at the behest of the appellant, because of diversity of citizenship. Now we find the appellant complaining that the Federal Court failed to follow the construction of the State Court, on certain legal principles.

ARGUMENT

Petitioner's sole claim for right of review by this Honorable Court is based on a claim of conflict of laws.

Petitioner states that the Circuit Court of Appeals, in reaching a conclusion in the case at bar, erroneously adopted the "efficient, dominant proximate cause" rule; that this rule is no longer the rule in Michigan; citing the case of *Budzinski v. Metropolitan Life Insurance Company,* 287 Michigan, 495, as authority for their statement.

We respectfully submit that appellant's contention is not tenable. The case at bar was tried and decided in the District Court of the Eastern District of Michigan, on the 19th day of January, 1939, while the Budzinski case, relied upon by appellant, was decided on July 6, 1939. Obviously any rule of law propounded in the Budzinski case would not be retroactive, and could have no force or effect upon cases decided prior thereto. This is analogous to the declaration of a new rule by statute, which clearly would not require the reversal of cases decided prior to the time it became law.

For the above reason, of itself, we respectfully submit that appellant's claim of a jurisdictional question falls of its own weight.

Waiving, however, for the purpose of argument, the fact that the case relied upon was decided subsequent to the case at bar, and is therefore not applicable here, we would respectfully call this Court's attention to certain pertinent facts concerning the Budzinski case.

Upon a study of that case it will be noted that it not only does not change the law of Michigan so as to be in

conflict with the decisions followed by the Circuit Court of Appeals, Sixth Circuit, in affirming the case at bar, but it is so dissimilar as regards the facts that it is not in point.

The case at bar involved a suit construing an accident policy which insured "against loss resulting directly and independently from accidental injury." The Budzinski case involved a policy which insured "against death resulting directly and independently of all other causes from bodily injury, effected solely through external, violent and accidental means," and further excluded recovery "if death results directly or indirectly from infirmity of mind or body."

The *admitted* facts in the Budzinski case were, that deceased would not have died from the injury alone—deceased having previously suffered from cerebral arteriosclerosis—and the concurring causes effected the death. The Court held that it was for the jury to determine the efficient, proximate cause of death; and having so determined, the Court affirmed the jury's finding, by a vote of four to three.

Upon a rehearing of the case, the Court by a five to three vote, reversed the former decision; basing its action solely on one clause of the policy which excluded recovery, viz., "If death results directly or indirectly from infirmity of the mind or body."

That decision was based entirely upon the construction of a particular clause in the insurance contract; which clause was not present in the case at bar.

In the case at bar, the testimony was that deceased had two drinks of liquor during the afternoon and evening (49); was a normal individual at 9:00 P.M. (50-52);

suffered a fall from icy steps shortly thereafter (29); was incoherent, delirious and immediately abnormal thereafter (29); and died within seven hours.

We refer to the above testimony solely for the purpose of demonstrating that the facts of the case relied upon by appellant, as a basis for seeking this Court's Writ of Certiorari, are not similar to those of the case at bar.

In the Budzinski case it was said that "neither (condition) was sufficient of itself to obtain this result." yet such was a fact to be determined by the jury.

In the case at bar there were conflicting claims, each supported by competent evidence under the theory of both appellant and appellee, that either cause might have produced death. But it was not admitted "that death would not have occurred but for the concurring causes." The testimony supported the finding of the jury, that the death was a result of an accident (32-42-43).

Therefore we respectfully assert that the Budzinski case does not control the case at bar, that there is no conflict of decisions. The rule of law which controls the instant case was laid down by the Supreme Court of the State of Michigan, in the cases of *Abbott v. Travelers Insurance Company,* 208 Mich. 654, and *Kansas v. New York Life Insurance Company,* 223 Mich. 238. These cases have not been overruled, nor does the Budzinski case purport to overrule them. The opinion of the Circuit Court of Appeals follows the applicable laws of the State of Michigan, thus complying with the decision in *Erie Railroad Company v. Tompkins,* 302 U. S. 671, and therefore there is no authority for the relief asked.

Counsel for appellant, on page 8 of their brief, state "The Michigan decisions relied upon * * * *have been*

effectively overruled by the Michigan Supreme Court." Just what counsel means by "effectively," in this instance, is not clear to us.

We have previously pointed out to this Honorable Court three reasons why appellant's postion is not tenable.

First—because the cited case was decided five months subsequent to the case at bar, and even if such decision did change the rule of law applicable, it would have no retroactive effect.

Second—that in fact the case relied upon by appellant did not change the rule of law, as contended by appellant, but *merely construed a specific clause limiting liability.*

Third—the facts in the case cited, and the facts of the case at bar were so dissimilar as to afford no basis of comparison.

Finally, petitioner states as its reason relied upon for allowance of the writ that the decision of the Court below was of an *important* question of local law. This mere statement cannot render the question one of importance, nor does petitioner at any place set forth the basis of the asserted importance. It merely involves the construction of an ordinary insurance policy, and is of importance only to the present litigants. The authority of the Supreme Court to review by writ of certiorari should be used sparingly and with great caution, and only in cases of peculiar gravity and general importance. This, in effect, is set forth in Supreme Court Rule number 38, subdivision 5, and its application may be seen in the case of *United States v. Johnston,* 268 U. S. 220.

CONCLUSIONS

1. There is no conflict between the decision of the Court below and the applicable laws and decisions of Michigan; and there is no important local question in any event.

2. Likewise, there is no question of general public importance or concern; nor does petitioner claim any conflict of decisions of Circuit Courts of Appeal.

3. Ultimately petitioner's sole reason for allowance of the writ is that the jury in the District Court accepted respondent's version of the facts, rather than that of petitioner, which obviously is not an adequate reason.

4. This suit filed by the widow, beneficiary for a death occurring on the 25th day of December, 1936, should be effectively and finally concluded, and the assumed liability discharged.

It is, therefore, respectfully submitted that the instant case is not one calling for the exercise by this Court of its supervisory powers, and that a writ of certiorari should not be granted.

Respectfully submitted,

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GUY G. BRATTON,
Counsel for Respondent.